FILE COPY

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 300

James Tooahimpah Tate,
Vila Tooahnippah (Paddlety),
Julia Tooahnippah (Goombi),
and James Tooahimpah Tate,
the duly qualified and acting
Administrator of the Estate of
Frankie Lee Tooahnippah,
deceased,
Petitioners,

VERSUS

Walter J. Hickel, Secretary of
the Interior for the United States,
and Dorita High Horse,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Omer Luellen
P. O. Box 96
First State Bank Building
Hinton, Oklahoma 73047

June, 1969

SUBJECT INDEX

AUTHORITIES

CASES:

Index Continued

STATUTES:

MISCELANEOUS:

APPENDIX

In the
Supreme Court of the United States
OCTOBER TERM, 1969

No. - - - - - -

James Tooahimpah Tate,
Vila Tooahnippah (Paddlety),
Julia Tooahnippah (Goombi),
and James Tooahimpah Tate,
the duly qualified and acting
Administrator of the Estate of
Frankie Lee Tooahnippah,
deceased,
Petitioners,

VERSUS

Walter J. Hickel, Secretary of
the Interior for the United States,
and Dorita High Horse,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Omer Luellen, Attorney for James Tooahimpah Tate, Vila Tooahnippah (Paddlety), Julia Tooahnippah (Goombi), and James Tooahimpah Tate, the duly

qualified and acting Administrator of the Estate of Frankie Lee Tocahnippah, deceased, petitioners herein, respectfully request in their behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 3, 1969, and in which case the said Court entered its Order denying a Petition for Rehearing which order denying rehearing was entered on the 8th day of April, 1969.

CITATIONS TO OPINIONS BELOW

The administrative decision of the Examiner of Inheritance acting pursuant to delegated authority for the Secretary of the Interior dated August 31, 1966, is unreported; it is printed in the Appendix hereto at pages i-ix.

The Order Denying Petition for Rehearing of the Examiner of Inheritance acting pursuant to delegated authority for the Secretary of the Interior dated November 16, 1966, is unreported; it is printed in the Appendix hereto at pages x-xii.

The administrative decision of Raymond F. Sanford, Regional Solicitor acting pursuant to delegated authority for the Secretary of the Interior dated June 20, 1967, and which became the Secretary of the Interior's final order is unreported; it is printed in the Appendix hereto at pages xiii-xviii.

The report of the District Court decision in this matter, Atewooftakewa vs. Udall, D. C. Okla. 277 F. Supp. 464 (1967) is set out infra in the Appendix hereto at pages xix-xxix.

Order and Judgment of the United States District Court for the Western District of Oklahoma entered

by the District Court on the 28th day of December, 1967, granting Plaintiffs Cross Motion for Summary Judgment and denying Defendants Motion for Summary Judgment and Denying Intervenors Motion for Summary Judgment is unreported; it is printed in the Appendix hereto at pages xxx-xxxi.

The Report of the Circuit Court of Appeals decision in this matter, High Horse vs. Tate, 407 F.2d 394 (1969) is set out infra in the Appendix hereto at pages xxxii-xxxv.

Order of the Circuit Court of Appeals denying Petition for Rehearing which Order was entered on the 8th day of April, 1969, is unreported; it is printed in the Appendix hereto at page xxxvi.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court is requested to grant a writ of certiorari because the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with decisions of the Court of Appeals for the District of Columbia Circuit as to whether judicial review can be given, under authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361, of the approval or disapproval by the Secretary of the Interior of a will made by an Indian pursuant to the authority granted in 25 U.S.C. § 373. A Judgment was rendered on March 3, 1969, and an Order denying Petition for Rehearing was entered by the United States Court of Appeals for the Tenth Circuit on the 8th day of April, 1969.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED FOR REVIEW

The question herein presented is:

Is a decision of the Secretary of the Interior approving or disapproving the Will of an Indian made pursuant to 25 U.S.C. § 373 subject to review under the authority of 5 U.S.C. § 702 and 28 U.S.C. § 1361.

STATUTES INVOLVED

Title 5 U.S.C. § 702:

Right of Review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 28 U.S.C. § 1361:

Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Title 25 U.S.C. § 372:

Ascertainment of heirs of deceased allottees; settlement of estates; sale of lands; deposit of Indian moneys

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies

before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: * * *"

Title 25 U.S.C. § 373:

Disposal by will of allotments held under trust

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless or until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is

subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located:* * *"

STATEMENT OF CASE

This case originated by the filing of a complaint by the Petitioners or their predecessors which complaint was filed in the United States District Court for the Western District of Oklahoma and was against Stewart L. Udall, the predecessor of the Respondent herein, Walter J. Hickel, Secretary of the Interior for the United States, and Dorita High Horse was allowed to file a plea in intervention.

The Complaint of the Petitioners requested the Court to review, reverse, and set aside the decision and Order of Stewart L. Udall, Secretary of the Interior entered on the 20th day of June, 1967, by the Secretary of the Interior, which Order by the Secretary of the Interior disapproved the Will of George Chahsenah dated March 14, 1963, and which Order stated that the Secretary of the Interior did not give his approval to the said Will and the approval of the said Will heretofore given by the Examiner of Inheritance was to be rescinded. The Petitioners further prayed in their Complaint that the Secretary of the Interior be directed to approve the probate of the Will of George Chahsenah dated March 14, 1963, and to Decree distribution of his estate according to the terms of said Will, and that the Petitioners have all other relief proper in law and equity.

The Order of the Secretary of the Interior entered on June 20, 1967, arose in the following manner.

On March 14, 1963, George Chahsenah made a will bequeathing and devising his property to the Petitioners herein and George Chahsenah, who was a Comanche Indian, died on the 11th day of October, 1963, at the age of approximately 55 years, which death occurred approximately six (6) months from the execution of his will dated March 14, 1963. The Examiner of Inheritance for the Secretary of the Interior acting pursuant to delegated authority approved the Will of George Chahsenah dated March 14, 1963, which approval of said Will was made on the 31st day of August, 1966, and a Petition for Rehearing was denied on November 16, 1966, by the Examiner of Inheritance.

Dorita High Horse and certain nieces and nephews of the decedent, George Chahsenah, perfected an appeal to the Secretary of the Interior from the decision of the Examiner of Inheritance and on appeal pursuant to delegated authority, the Regional Solicitor for the Tulsa Region of the Office of the Solicitor for the Department of the Interior, issued an Order on June 20, 1967, disapproving the Will of the decedent, George Chahsenah, which Order by the Regional Solicitor was the final administrative decision of the Secretary of the Interior relative to the approval or disapproval of the said Will. The said Order issued on June 20, 1967, stated that the Secretary of the Interior was withholding his approval of the purported Will because the decedent, George Chahsenah, had made no effort during his lifetime to support his illegitimate daughter and therefore, there was not a just and equitable treatment of the decedents heir at law, namely, Dorita High Horse. The Regional Solicitor speaking for the Secretary

of the Interior stated that by the exercise of his discretionary responsibility he could disapprove the Will of the decedent, which disapproval was in fact consumated by the Secretary of the Interior giving as his reasons for said disapproval the reasons aforestated.

Judge Eubanks rendered his Memorandum Opinion after the Complaint had been filed herein requesting that the Secretary of the Interior be directed to approve the Will of the said decedent Indian and distribute his estate according to the terms of his Will. Judge Eubanks, in his Memorandum Opinion, Appendix xix-xxix found that the denial of the approval of the last Will and Testament of George Chahsenah by the Secretary of the Interior lacked rational basis and was an arbitrary and capricious denial of the right conferred upon an Indian by Congress to make his last Will and Testament. A judgment was rendered by District Judge Eubanks ordering and directing that the last Will and Testament dated March 14, 1963, of George Chahsenah, a deceased Comanche Unallottee Indian, be approved by the Secretary of the Interior, and Judge Eubanks further ordered that the Estate of the said Indian be distributed in accordance with the terms of the last Will of the said decedent.

An appeal was taken to the Circuit Court of Appeals for the Tenth Circuit by Stewart L. Udall, Secretary of the Interior, and by Dorita High Horse, Intervenor. The Court of Appeals following its decision in Heffelman vs. Udall 378 F. 2d 109 (1967) and Attocknie vs. Udall 390 F. 2d 636 (1968) Cert. den. October 14, 1968, vacated the Judgment of the trial Court and remanded the case with directions to dismiss the action and complaint for want of jurisdiction. An examination of Heffelman vs. Udall Supra and Attocknie vs. Udall Supra will reveal that the United States Court of Appeals for

the Tenth Circuit has held that 25 U.S.C. 373 complements 25 U.S.C. 372 and where 25 U.S.C. 372 states that the decision of the Secretary of the Interior in ascertaining the heirship of a deceased Indian shall be final and conclusive and is therefore not subject to a review under the Administrative Procedure Act or other applicable Statutes; the same reasoning applies to 25 U.S.C. 373. The Circuit Court for the Tenth Circuit in said opinions stated that even though 25 U.S.C. 373 does not contain a statement that the decision of the Secretary of the Interior in the approving or disapproving of the Will of a deceased Indian shall be final and conclusive, Congress intended that there should be no legal review under 25 U.S.C. 373 of the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian, and therefore, the decision of the Secretary was final and conclusive and the District Court for the Western District of Oklahoma did not have jurisdiction under the Administrative Procedure Act or under any other applicable Statute to review the decision of the Secretary of the Interior and the original Complaint asking judicial review of the action of the Secretary of the Interior should be dismissed for lack of jurisdiction.

Your Petitioners request this Court to grant a Writ of Certiorari to review the decision of the Circuit Court of Appeals in this case, which decision held that the approval or disapproval by the Secretary of the Interior of a Will of an Indian made pursuant to 25 U.S.C. 373 is final and conclusive and not subject to judicial review pursuant to the Administrative Procedure Act 5 U.S.C. 701 or pursuant to any other applicable Statute.

REASONS FOR ALLOWANCE OF WRIT

Your Petitioners believe that it will occasion no surprise to this Court that the decisions of the Circuit Court of Appeals for the Tenth Circuit in the case of your Petitioners and in other similar cases are in conflict with the decisions from other Circuits and particularly from the Circuit Court of Appeals for the District of Columbia, which conflict pertains to whether or not judicial review is permissible under the A.P.A. and other applicable Statutes of the approval or disapproval of the Will of an Indian by the Secretary of the Interior under Section 2 of 1910 Act (25 U.S.C. 373).

Your Petitioners further state that the first case involving the problem under consideration is Homovich vs. Chapman, 191 F.2d 761, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on June 21, 1951. In this case, the Secretary of the Interior maintained that Wills of Indians were not reviewable by the Courts because Section 1 of the 1910 Act dealing with the determination of the heirs of an Indian who died without a Will provides that his determination shall be "Final and Conclusive" and therefore Section 2 dealing with Wills must be read as though it contained a similar provision, although in fact it does not contain such a provision. Circuit Judge Prettyman disagreed with the position of the Secretary of the Interior and he stated that it was plain to him that if Congress had meant that the decisions of the Secretary of the Interior under Section 2 should be final and conclusive, Congress would have said so and, consequently, the approval or disapproval of a Will of an Indian by the Secretary of the Interior was subject to judicial review under the Administrative Procedure Act. Judge Prettyman further stated that the fact that the acts of the

Secretary in providing regulations for the execution of Wills of Indians and regulations in regard to the approval of same require the exercise of discretion and judgment on the part of the Secretary of the Interior; nevertheless, this fact does not preclude judicial review of the action of the Secretary of the Interior in approving or disapproving the Will of an Indian.

Your Petitioners further state that the next applicable case for the problem under consideration is Hayes vs. Seaton, 270 F.2d 319, Cert. Den 364 U.S. 814, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on July 9, 1959. The opinion by the majority of the Court was rendered by Circuit Judge Edgerton and a dissenting opinion in conformity with the position of your Petitioners herein was rendered by Circuit Judge Burger. The opinion of the majority held that under the authority of 25 U.S.C. 372 the decision of the Secretary that an Indian who disappeared without being thereafter heard from in year before the Indians father died leaving Will giving residue of property to said Indian who had disappeared had survived his father so that the property of the father and the property of his son went to the sons heir was final and conclusive and the majority opinion held that even though the father had made a Will there could be no legal review of the disposition of the fathers estate pursuant to his Will. Judge Burger in a detailed and persuasive dissenting opinion takes the position that 25 U.S.C. 373 does not complement 25 U.S.C. 372 and your Petitioners presume that the Court will take cognizance of the fact that 25 U.S.C. 372 is cited as Section 1 of the 1910 Act and 25 U.S.C. is cited as Section 2 Of the 1910 Act.

In his dissenting opinion, Judge Burger stated as follows:

> "In other words, the Examiner made a finding with respect to the son's Section 1 estate, and then in disposing of the father's Section 2 estate, merely adopted this finding without further consideration. Nevertheless, it is clear that a finding as to the date of the son's death is essential to the disposition of both estates. That this finding was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in Homovich v. Chapman, 1951, 89 U. S. App. D.C. 150, 191 F.2d 761, that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding.
>
> Nor do I agree with the majority when they say that Section 2 has no relevance because it merely gives the Secretary authority to 'approve' Indian wills. The Examiner determined who should inherit the property of John Thomas under his will. The authority to make such a determination must be found in Section 2 or else it does not exist. Section 1 does not give the Secretary any such authority: it deals only with intestate property. Section 2, which conferred upon John Thomas the right to devise property in accordance with the Secretary's regulations, thereby implicitly gave the Secretary authority to resolve the present dis-

pute which arises from an exercise of that statutory right. This authority has been exercised in this case, and seems to me subject to judicial review under Homovich v. Chapman, supra.

To summarize, the fact that the District Court may perhaps not have power to review the Secretary's Section 1 decision concerning the son's estate alone is irrelevant insofar as a Section 2 decision is concerned, and all judicial review should not be foreclosed simply because the dispositive finding is present in both decisons below. The Secretary argues that this may lead to 'the absurd result of contradictory findings of the same fact.' This argument is not convincing because, if the court should reverse one of the Secretary's determiniations while not passing on the other, it has not thus prevented the Secretary himself from subsequently reviewing that decision which has been left untouched by the court. The problem of 'contradictory findings' is within his power to correct. Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See Monongahela Bridge Co. v. United States, 1910, 216 U.S. 177, 195, 30 S. Ct. 356, 361, 54 L.Ed. 435;[2] The King v. Plowright, 3 Mod. 94, 87 Eng. Rep. 60 (K.B.1686); 4 Davis, Administrative Law Treatise ch. 28 (1958).

Professor Jaffe has stated the general principle thusly: '(I) n our system of

remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity.' Jaffe, The Right to Judicial Review, 71 Harv.L.Rev. 401, 420 (1958). * * *

Section 10 (e) of the A.P.A. lays down broad general guides for the scope of review. These guides only infrequently answer specific problems as posed by actual cases. As Professor Davis has put it, 'the degree of intensity of review is not necessarily susceptible of embodiment in a word formula.'[4] Yet we do find guides consistent with Section 10 (e) of the A.P.A. in a phrase that runs through the cases: an administrative decision should be upheld unless it is not supported by substantial evidence on the record considered as a whole. See Universal Camera Corp. v. N. L. R. B., 1951, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456.[5] Homovich v. Chapman certainly did not intend to deviate from these established general formulas. If anything, the spirit as distinguished from the letter of that case tends to a broadening of the scope of review. This is clearly indicated by the court's holding there that Section 10 of the A.P.A. is applicable to cases arising under Section 2 of the 1910 Act." * * *

(Footnotes deleted).

Your Petitioners further state that the next applicable case for the problem under consideration

is Asenap vs. Huff, 312 F.2d 358, which decision was rendered by the United States Court of Appeals for the District of Columbia Circuit on December 20, 1962, in a Per Curiam opinion. In Asenap vs. Huff Supra, the Circuit Court of Appeals for the District of Columbia again reviewed the decision of the Secretary of the Interior and took jurisdiction for legal review of the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian pursuant to 25 U.S.C. 373. The Court in the opinion it rendered held that the decision of the Secretary in approving the Will of the said Indian in question was not arbitrary and capricious and that the decision of the Secretary was supported by the record and the Court granted summary judgment in favor of the Defendant Secretary and certain intervenors.

Your Petitioners further state that the Per Curiam opinion of Asenap vs. Huff, Supra was relative to the Estate of Wook-Kah-Nah, Comanche Allottee No. 927 which estate is set out in the Interior decisions under the following citation: 65 I.D. 436. This decision was rendered by the acting Solicitor for the Department of the Interior on October 21, 1958, wherein on Appeal, he approved the decision of the Examiner of Inheritance, who had approved in the hearing before him, the last Will and Testament of Wook-Kah-Nah. Wook-Kah-Nah left as her heirs at law, six children and two grandchildren and in her Will she gave the lands on which there were valuable oil wells to two of her children. In other words, two of her children were favored far beyond the rest of her children. It was brought out at the hearing that she was an

illiterate woman who could not read or write, but nevertheless, the acting Solicitor of the Department of the Interior approved the Will and he made the following statement in his Opinion approving the Will and in approving the Opinion of the Examiner of Inheritance:

> "It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954."

Your Petitioners further state that if the Solicitor would have desired to use the equity theory (which was used in your Petitioners case), he could have withheld the approval of the Will of Wook-Kah-Nah and he could have stated that equity would be disbursed more evenly if the oil runs were disbursed among her children instead of going to two of her children as her Will provided.

Your Petitioners further state that Heffelman vs. Udall, 378 F.2d 109 (1967) was a decision rendered by the United States Court of Appeals for the Tenth Circuit on May 24, 1967. Circuit

Judge Lewis issued an opinion which stated that Section 1 of the 1910 Act (25 U.S.C. 372) establishes the finality of the Secretary's determination of heirship under intestacy. Judge Lewis further stated as follows:

> "We think that as long as an Indian allotment remains subject to the Secretary's control, cf. Hanson v. Hoffman, 10 Cir., 113 F.2d 780, sections 1 and 2 of the Act of 1910 should be viewed as complementing each other with respect to the finality of the administrative determination of facts. We accordingly conclude that such a determination comes within the jurisdictional exception stated in section 10 of the Administrative Procedure Act."

Your Petitioners further state that in their opinion, the Heffelman case is the first case that definitely held that Section 1 of the 1910 Act and Section 2 of the 1910 Act complement each other and therefore because determination of heirship under Section 1 is final and conclusive, the same reasoning applies to Section 2 and the approval or disapproval of a Will of an Indian by the Secretary of the Interior is final and conclusive and not subject to judicial review even though Section 2 does not contain the final and conclusive prohibition.

Your Petitioners further state that the next decision rendered concerning the direct point under consideration by a Circuit Court is the case of Attocknie vs. Udall, 390 F.2d 636 (1968), which decision was rendered on March 14, 1968, by Circuit Judge Seth of the Circuit Court of Appeals for the Tenth Circuit. Judge Seth stated in said opinion that Heffelman vs. Udall,

378 F.2d 109, 10th Circuit had already held that judicial review of the administrative decision relating to the distribution of the Estate of an Indian is not permitted under the A.P.A. and therefore there is no jurisdiction for the Courts to give judicial review to the approval or disapproval of the Will of an Indian by the Secretary of the Interior under Section 2 of the 1910 Act (25 U.S.C. 373) and the Court therefore ordered the complaint dismissed for lack of jurisdiction.

The next Circuit Court decision, of course, is the decision rendered by the Tenth Circuit in the case of your Petitioners, which decision was rendered in High Horse vs. Tate, 407 F.2d 394 (1969) in a Per Curiam opinion issued on March 3, 1969. This opinion is in the Appendix at pages xxxii-xxxv and the Tenth Circuit Court of Appeals again held that under the authority of Heffelman vs. Udall, 378 F.2d 109 (1967) and Attocknie vs. Udall, 390 F.2d 636 (1968), cert. den. 393 U.S. 833, 89 S. Ct. 104, 21 L.Ed. 2d 104, 1968, the Court does not have jurisdiction to review the decision of the Secretary of the Interior in approving or disapproving the Will of an Indian executed pursuant to Section 2 of the 1910 Act (25 U.S.C. 373) and the judgment of the trial Court was vacated and the case remanded with directions to dismiss the action for want of jurisdiction.

Your Petitioners further state that there is a direct conflict between the decisions of the Circuit Court of Appeals for the District of Columbia and the Circuit Court of Appeals for the Tenth Circuit relative to whether or not judicial review can be granted under the A.P.A. and other applicable Statutes of the approval or disapproval of an Indians Will by the Secretary of the Interior

pursuant to Section 2 of the 1910 Act (25 U.S.C. 373), and this conflict has been outlined by your Petitioners in the cases heretofore cited under the part of this Petition designated "Reasons for Allowance of Writ".

Your Petitioners further state that this Court has firmly established that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress and this Court has echoed this theme by noting that the Administrative Procedure Acts generous review provisions must be given a hospitable interpretation, Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed 2d 681 (1967), Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L.Ed. 868, United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 St. Ct. 1410, 1414-1415, 93 L.Ed. 1451; Brownell v. We Shung, 352 U.S. 180, 77 S. Ct. 252, 1 L.Ed. 2d 225; Heikkila v. Barber, 345 U.S. 229, 73 S. Ct. 603, 97 L.Ed 972.

Your Petitioners further state that the Courts show "great deference to the interpretation given (a) statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.Ed 2d 616; Gardner v. Brian, 369 F.2d 443 (10 Cir.). Your Petitioners further state that the Bureau of Indian Affairs and the Secretary of the Interior originally interpreted that the Secretary of the Interior was without the authority to change the provisions of the Will of Indian, and your Petitioners wish to cite as authority for this interpretation the 1958 revision

of the Indian Law Book published under the authority of the United States Department of the Interior at Page 813. In the 1958 revision the said law book states as follows:

> "The authority of the Secretary of the Interior is limited to approval or disapproval of an Indian will, and he is without authority to change the provisions of the will by making a different provision than that provided by the testator." (Memo Sol. I. D., May 10, 1941.)

Your Petitioners further state that the Solicitors Memorandum of May 10, 1941, referred to is as follows:

"UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

May 10, 1941

MEMORANDUM for the Assistant Secretary.

The attached letter to the Secretary, dated April 28, recommended disapproval of the will of William Smith, deceased Nez Perce Allottee No. 157 of the Northern Idaho Agency. The only reason given for disapproval of the will is that the will 'does not conform with Secretary's Order No. 420, dated August 14, 1933, prohibiting, except under certain circumstances, the alienation of Indian lands and the issuance of patent in fee.' That order forbids, with certain exceptions, the sale of restricted or Indian trust

lands and the removal of restrictions from such lands by issuance of certificates of competency, patents in fee, or orders removing restrictions. It has no application to testamentary disposals of Indian property.

The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about $900 to Louie J. Grende, a white man. Specific devises are also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maud was made because he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in

the amount of $600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right *** to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other imposition, which clearly is not present.

I recommend that the will be approved.

For the Solicitor,

/s/ W. H. Flanery,
Chief of Division.

Approved and referred to the
Commissioner of Indian Affairs: May 12, 1941
/s/ Oscar L. Chapman
Assistant Secretary."

Your Petitioners further state that the refusal of the Secretary of the Interior to approve the Will of the decedent Indian herein for equitable reasons amounted to the Secretary of the Interior substituting his will for that of the Indian and is not permissible pursuant to the Solicitor's Memorandum of May 10, 1941, heretofore set out.

Your Petitioners further state that the statement in Heffelman vs. Udall, 378 F. 2d 383 (1967) Tenth Circuit that Sections 1 and 2 of the Act of 1910 complement each other is a false premise.

Your Petitioners further state that the validity of this statement that the said premise is false can be verified by the authority of the 1958 revision of the Indian Law Book published by the United States Department of the Interior at Pages 122 and 123 in said Law Book, which states as follows:

> "The act of June 25, 1910 (36 Stat. 855), constituted what is probably the most important revision of the General Allotment Act that has been made. Based on 33 years of experience in the administration of the act, it sought to fill gaps and deficiencies brought to light in the course of that period. These related particularly (a) to the administration of estates of allottees, (b) to the making of leases and timber contracts for allotted lands, and (c) to the cancellation or relinquishment of trust patents.
>
> Section 1 of this act (25 U.S.C. 372) set forth a comprehensive plan for the administration of allottees' estates, conferring plenary authority upon the

Secretary of the Interior to administer such estates and to sell heirship lands. Section 2 (25 U.S.C. 373) authorized testamentary disposition of allotments with the approval of the S cretary of the Interior and the Commissioner of Indian Affairs. Section 3 (25 U.S.C. 408) permitted relinquishment of allotments by allottees in favor of unallotted children, who had been completely ignored in the original scheme of allotment to living Indians.

Section 4 of the act (25 U.S.C. 403) permitted leasing of Indian allotments held by trust patent for periods not to exceed 5 years in accordance with regulations of the Secretary of the Interior, and conferred upon the Secretary power to supervise or expend for the Indians' benefit the rentals thereby received. Section 5 (25 U.S.C. 202) made it unlawful to induce an Indian to execute any conveyance of land held in trust, or interests therein. Section 6 (18 U.S.C. 1153, 1156) contained various provisions for the protection of Indian timber against trespass and fire. Section 7 (25 U.S.C. 407) contained a general authorization for the sale of timber on unallotted lands under regulations prescribed by the Secretary of the Interior. Section 8 (25 U.S.C. 406) contained a similar authorization for timber sales on restricted allotted lands.

Section 13 of the act (43 U.S.C. 148) authorized the Secretary of the Interior to

reserve from entry Indian power and reservoir sites, and the following section (25 U.S.C. 352) authorized the Secretary of the Interior to cancel patents of equal value and reimbursing the Indian for improvements on the canceled allotment. Other sections contained minor amendments to the General Allotment Act and related legislation.

The provision of this act relating to testamentary disposition of allotments was amended and amplified by the act of February 14, 1913 (25 U.S.C. 373). As amplified, the privilege of testamentary disposition subject to departmental approval was extended not only to Indians possessed of allotments, but also to Indians having individual Indian moneys or other property held in trust by the United States.

Your Petitioners further state that the argument that Section 1 of the Act of 1910 complements Section 2 of the Act of 1910 is not a valid argument, and your Petitioners further state that each separate section stands on its own contents and it is illogical to presume that the final and conclusive clause in Section 1 of the 1910 Act complements the various other numerous sections of the 1910 Act.

Your Petitioners further state that the Will of the decedent Indian herein was executed in all respects in accordance with the applicable laws and regulations (applicable regulations are found in Appendix xxxvii-xxxviii. Dorita High Horse and certain other parties made a desperate effort to discredit the factum of the Will of the

decedent Indian, but they were unsuccessful. On appeal, the Secretary of the Interior acting by and through the Regional Solicitor by delegated authority withheld approval of the Indians Will for equitable reasons with the end result that the entire estate of the decedent Indian descends and vests in Dorita High Horse instead of the devisees and legatees to whom the property was devised and bequeathed by the decedent Indian in his Will.

Your Petitioners further state that the trial Court had considerable doubt as to the paternity of Dorita High Horse which doubt was cogently set out by District Judge Eubanks in a footnote of his Memorandum Opinion which footnote can be found on page xxiv of the Appendix.

Your Petitioners further state that the decedent Indian was given the right to make his will by Congress and it was never the intent and purpose of Congress to give the Secretary of the Interior the arbitrary authority to disapprove the Will of an Indian for equitable reasons. Your Petitioners give as an illustration the example of the Secretary of the Interior giving as his reason for disapproving the Will of the decedent Indian a statement that the decedent Indian was a member of the Apache Tribe of Indians and that the Apache Indian Tribe had always been a murderous group of Indians and therefore any Will executed by an Apache Indian should not be and would not be approved by the Secretary of the Interior. Your Petitioners further believe that all Courts would take jurisdiction under such a factual situation and particularly under the authority of 28 U.S.C.

§1361 and thereby direct the Secretary of the Interior by an order in the nature of a mandamus to approve the Will of the decedent Indian if his only reason for disapproving the Will of the decedent Indian was the reason as stated that the decedent Indian was a member of the Apache Tribe of Indians.

Your Petitioners further state that the equitable reason given by the Secretary of the Interior acting by and through the Regional Solicitor for the disapproval of the decedent Indians Will in this case was not a valid or legal reason for the failure to approve the Will of the decedent Indian, therefore by the arbitrary denial of the right of the Indian to make a Will and have same approved, the Secretary of the Interior was subject to an Order to approve said Will in the nature of a mandamus as he was directed and ordered to so do by the Trial Court herein, pursuant to the jurisdiction granted by 28 U.S.C. § 1361 and even though if the final and conclusive clause of 25 U.S.C. 372 keeps A.P.A. from applying, the Courts herein could order approval of the Will under jurisdiction granted by 28 U.S.C. 1361 as was done and ordered by the Trial Court herein.

Your Petitioners further state that your Petitioners case can further be distinguished from Heffelman vs. Udall supra and Attocknie vs Udall supra because in those cases the Court did not take jurisdiction under 28 U.S.C. 1361 whic h the Trial Court did in your Petitioners case.

Your Petitioners further state that a very persuasive article, which your Petitioners believe supports their position in regard to 28 U.S.C. 1361 is an article by Byse and Fiocca, § 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action. 81 Harv. L. Rev. 308 (1967).

Your Petitioners further state that Byse and Fiocca at Page 351 of the Harvard Law Article definitely states that Section 1361 was intended to be jurisdictional, and your Petitioners further state that 1361 being jurisdictional can be used as jurisdiction in your Petitioners case if this Court should rule that the final and conclusive Section of 25 U.S.C. 372 applied to and complements 25 U.S.C. 373.

Your Petitioners further state that Ashe v. McNamara, 355 F.2d 277 (1st Cir.) further confirms the position of your Petitioners that 28 U.S.C. 1361 can be used for jurisdictional authority which case also pertains to "final and conclusive" and the Court held that final and conclusive of Article 76 of the Uniform Code of Military Justice did not prevent legal review under 28 U.S.C. 1361.

Your Petitioners in summary state that final and conclusive should not apply to 25 U.S.C. 373 and judicial review under the A.P.A. is permissible and the Circuit Court of Appeals for the District of Columbia holding accordingly should be confirmed by this Court and the conflict between the Court of Appeals for the District of Columbia and the Court of Appeals for the Tenth Circuit should be

resolved, and your Petitioners further state that this Court should further find that 28 U.S.C. 1361 can be used as jurisdictional authority for situations where the administrative agency acts in an arbitrary and capricious manner as was done herein according to the holding of the Trial Court herein.

Your Petitioners further state that Abbott Laboratories vs. Gardner Supra which held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress," greatly expands the catagory of Plaintiffs who have standing to demand non-statutory review when applied to persons aggrieved or adversely affected and your Petitioners are greatly aggrieved persons and adversely affected persons and should be granted jurisdictional review.

Wherefore, your Petitioners pray that a Writ of Certiorari be granted and issued by this Court to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case.

Omer Luellen
P.O. Box 96
First State Bank Building
Hinton, Oklahoma 73047

Attorney for Petitioners

June, 1969

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Office of the Examiner of Inheritance
712 Petroleum Building
Tulsa, Oklahoma 74103

PROBATE
H-173-66
KRB

IN THE MATTER OF THE ESTATE OF: George Chahsenah, deceased Comanche Unallottee	)))))	ORDER APPROVING WILL AND DECREEING DISTRIBUTION

This case coming on to be heard before the Examiner of Inheritance, Office of the Solicitor, Tulsa, Oklahoma, and upon submission of the evidence, the following facts and conclusions of law are presented.

Four separate formal hearings were held in this estate. Notices of the first hearing were duly served upon the known probable heirs, devisees and other interested parties prior to that hearing by mailing a copy of such notice to each of them at their last known mailing address, and by posting a notice at five public places within the vicinity of the Anadarko Agency of the Bureau of Indian Affairs in Oklahoma, for 20 days or more prior to such hearing. Notices of the supplemental hearings were mailed to all known interested parties, or their attorneys of record, at least twenty days prior to scheduled hearings.

These hearings were concluded at Anadarko, Oklahoma, on December 9, 1965, for the purpose of ascertaining the heirs at law of this decedent and the facts and circumstances surrounding the execution of an instrument in writing, dated March 14, 1963, purporting to be his last will and testament.

The evidence adduced at these hearings disclosed that the decedent died on October 11, 1963, at the age of approximately 55 years, a resident of the State of Oklahoma. Beyond this, there are relatively few undisputed questions of fact or law. Dorita High, Kiowa-Comanche Unallottee, claims to be a surviving daughter, and, therefore, his sole heir at law. This is denied by the fifteen nieces and nephews who appear to be his heirs at law - if Dorita High is not his daughter. The majority of these nieces and nephews, and Dorita High, contend that the decedent was mentally incompetent to execute a valid last will and testament on March 14, 1963, and that the purported testamentary instrument executed on that date is not entitled to Departmental approval.

The evidence does establish that the decedent was never married, and that he had no surviving parent, brother or sister. Under the provisions of the Act of February 28, 1891, 26 Stat. 795, Dorita High would be an heir at law, if she is a daughter of this decedent, irrespective of any recognized marriage between her parents. On August 31, 1949, the decedent signed a sworn statement acknowledging that Dorita High was his daughter. On November 27, 1956, the decedent made a will stating that he had no children. The testimony of the numerous witnesses in this matter is equally inconsistent as to what the decedent did or said regarding this paternity question. Bearing in mind the apparent interest of some of the witnesses who testified on this question, their credibility, based on the personal observation of the undersigned, and the issues involved when the above-mentioned written instruments were

made, it is hereby found that Dorita High is, in fact, a daughter of this decedent. Therefore, under the laws of the State of Oklahoma and applicable Federal statutes, she would be the sole heir at law in the estate if the decedent had died intestate.

The decedent's trust or restricted property consists of interests in three Comanche allotments which are hereinafter described, and are situated in Oklahoma under the jurisdiction of the Anadarko Agency of the Bureau of Indian Affairs.

By the terms of the decedent's last will and testament, he makes specific devises to his niece, Viola Atewooftakewa, and to three of her children: Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah. The same four devisees are also the residuary beneficiaries who would share equally in any property not covered by the specific devises.

The evidence shows that the decedent's last will and testament was prepared by an attorney who, at that time, was employed by the Department. The scrivener and attesting witnesses, at the time this instrument was made, executed an affidavit showing that the will was properly made and executed when the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress or coercion. They could not recall this particular instrument or the decedent when they testified in this matter, but nothing was presented which would cast any doubt on their honesty, belief, or views as expressed in the affidavit.

The contestants of this will urge that from some date in the early 1940's, the decedent drank whisky, wine or other alcoholic beverages to an excess. Further, that this drinking pattern was progressive and that as the result of this excess use of alcohol, coupled with ill health, his mind was so deteriorated that he was mentally incompetent to make a valid testamentary disposition of

his property on March 14, 1963. While the evidence as to the nature and extent of the decedent's drinking pattern is extremely conflicting, the applicable rule of law is not. This Department has held in the Estate of Harris Eugene Russell, 70 I.D. 151, decided May 2, 1963, that the burden of proving mental capacity due to ill health and prolonged use of intoxicants is upon the contestant, and the testimony of law witnesses, who were not present when the will was made, is insufficient to meet this burden. This Russell case, wherein the initial ruling accepted a position similar to that asserted by the contestants, is distinguishable from the present case only in that the facts of chronic alcoholism coupled with diabetes were established to the satisfaction of the Superintendent of the Osage Indian Agency who made the findings of fact. In this case, the undersigned does not believe the evidence supports the factual conclusions which existed in the Russell case.

Several of the contestants and interested witnesses appearing on their behalf, testified that the decedent was always drunk during the last several years of his life. Other witnesses, whose interest in the matter was not established, also testified that they never saw the decedent sober during this same period. Without commenting on the credibility and knowledge of each individual witness, the following general observations seem applicable to all of this testimony. No one disputes the fact that this decedent drank to an excess - often and over an extended period of time.

The undersigned has no difficulty in accepting the fact that the decedent's excessive drinking may have grown progressively worse during the last few years since this appears to be

consistent with the pattern followed by all who use alcohol to an excess. On the other hand, it is impossible to accept at face value, testimony to the effect that he was "never sober" for a period of several years. Likewise, the undersigned would reject the idea that employees of the Field Solicitor's Office, past, present or future, would knowingly participate in the preparation and execution of a will for an intoxicated person. Further, it should be noted that drunken behavior stands out in every way from "normal, non-intoxicated behavior". It follows, therefore, that recollection of individual witnesses would naturally favor those experiences wherein alcohol was involved. If these general observations tend to favor validity of this will, one final general observation which might support an opposing view should be made. The contestants testified that when the decedent "needed" or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol. This same testimony indicates that his relationship to friends and relatives was very often controlled by his drinking pattern at that time. This testimony is accepted as true for the same reason that other general conclusions in the paragraph are accepted. Such testimony is consistent with the common pattern and experience of those who use alcohol to an excess.

The testimony of all the witnesses who testified regarding the decedent's mental condition and drinking habits has been carefully considered and reviewed - regardless of the apparent interest or lack of interest - - of any witness. However, there is clear and convincing evidence by truly disinterested witnesses who were living in the same vicinity as the decedent at the time this will was made, which supports the conclusion that Mr. Chahsenah was mentally competent to make a will in

March, 1963, if he was sober. The testimony of other witnesses to the contrary is not sufficient to be convincing to the undersigned, particularly, when coupled with the terms of the instrument itself and general practice of the Field Solicitor's Office at Anadarko, which is followed with regards to testamentary instruments.

This will is not unnatural in that it fails to provide for the decedent's daughter, Dorita High. There is no evidence that he had any close paternal ties to this girl during the later part of his life. After the death of his mother in 1954, his closest relatives, besides his daughter, were nieces and nephews, and the testimony speaks for itself in establishing that relationships with these nieces and nephews was often "strained". On November 27, 1956, he executed a will naming his niece, Viola Atewooftakewa as the sole beneficiary, and stated that Viola had been raised in his mother's home. Subsequently, he made four more wills including the March 14, 1963 instrument. In addition to the testimony, all five of these instruments have been reviewed in the light of the other evidence. It is hereby found that this last will is natural and logical in the light of all the evidence.

It is hereby found that this will was made in accordance with the facts and circumstances expressed in the testimony of the attesting witnesses, and no clear and convincing evidence has been presented which would justify denying Departmental approval.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat.

855), and other applicable statutes, and pursuant to 25 CFR 15, I hereby approve the decedent's last will and testament, dated March 14, 1963.

IT IS ORDERED, that the Superintendent will cause to be made a distribution of the trust or restricted estate of the decedent in accordance with his last will and testament, subject to payment of the probate fee and allowed claims, as follows:

To Viola Atewooftakewa, niece, and Frankie Lee Tooahnippah, grand-nephew, Comanche Unallottees and devisees, an undivided one-half interest in the following:

> An undivided 1/4 interest in the allotment of Wah-ah-rock-ah, Comanche #2326, described as the SW/4 of Section 3-2N-8W, I.M., in Okla., containing 160 acres.

To Vila Tooahnippah and Julia Tooahnippah, grand-nieces, Comanche Unallottees and devisees, an undivided one-half interest in the following:

> All that part of the allotment of Sarah Chahsenah, Comanche #2778, described as the SW/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.
>
> An undivided 1/5 interest in the allotment of Sarah Chahsenah, Comanche #2778, described as the SE/4 SW/4 of Sec. 4-4N-10W, I.M., in Oklahoma, containing 40 acres.

To Viola Atewooftakewa, niece, Frankie Lee Tooahnippah, grand-nephew, Vila Tooahnippah and Julia Tooahnippah, grand-nieces, Comanche Unallottees and devisees, an undivided 1/4 interest in the following:

> Any and all other trust property, real, personal or mixed, not otherwise disposed of under the terms of the will, if any there be.

The following claims are hereby allowed and are to be paid in the order listed below from funds now held or hereafter accruing to the credit of the estate, subject to payment of the probate fee:

1. Crews Funeral Home, Apache, Oklahoma, in the amount of $843.00, covering decedent's funeral expenses.

(The following claims have equal priority of payment).

2. James W. Aust Finance & Loan Co., 510 D. Ave., Lawton, Oklahoma, in the amount of $332.79, covering loans made to the decedent from November 1960 through February 1961.

C. H. Christian, Route 3, Apache, Oklahoma, in the amount of $56.85, covering money loaned to the decedent.

Schartzer's Food Market, Apache, Oklahoma, in the amount of $124.60, covering groceries purchased by the decedent.

Elliott Department Store, P.O. Box 352, Apache, Oklahoma, in the amount of $10.15, covering purchases made by the decedent.

D. V. Warner, Apache, Oklahoma, in the amount of $1,000.00, covering money loaned to the decedent on July 1, 1961, for the purpose of providing legal services to Strudwick Tahsequah represented by a promissory note signed by this decedent. The balance of the claim of D. V. Warner in the amount of $2,353.77, also represented by a promissory note, dated July 1, 1961, is hereby disallowed. This latter instrument purportedly relates to some vague gift transaction between the claimant and the decedent which was never completed during the decedent's life. The undersigned is not prepared to obligate the payment of trust or restricted funds to complete this transaction where any contractual rights are extremely dubious due to lack of adequate consideration.

The trust or restricted estate of the decedent having been appraised at $34,867.00, a probate fee of $75.00 will be collected by the Superintendent or other officer in charge pursuant to authority found in the Act of January 24, 1923 (42 Stat. 1185).

Done at the City of Tulsa, Oklahoma, and dated August 31, 1966.

(Sgd.) Kent R. Blaine
Kent R. Blaine
Examiner of Inheritance

Appendix x

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Office of the Examiner of Inheritance
712 Petroleum Building
Tulsa, Oklahoma 74103

PROBATE
H-173-66
H-220-66
KRB

IN THE MATTER OF THE ESTATE OF:	)	
George Chahsenah, deceased Comanche Unallottee	)	PETITION FOR REHEARING DENIED

The above-named decedent's last will and testament was approved by the undersigned on August 31, 1966, Probate #H-173-66. On October 31, 1966, Dorita High Horse, Zelma Tselee, John H. Chahsenah, Garnett Tahsequaw, Betsy Lois Chahsenah (Tarsip), Earl Chahsenah, Strudwick Tahsequaw, Lydia Mae Tarsip, James Chahsenah and Albert Tahsequaw, Jr., filed a petition for rehearing under the provisions of 25 CFR 15.17.

The petitioners assert that the last will and testament dated March 14, 1963, was not a proper testamentary instrument, and the order approving it was in error as a matter of fact and as a matter of law. No specific errors of law are set forth; the petitioners' position, simply stated, is that the evidence does not support the factual conclusions reached by the undersigned regarding the testator's mental capacity at the time the will was made and executed.

The extensive evidence presented in this case was carefully considered prior to the initial ruling. It has again been reviewed in the light of the arguments set forth in the petition for rehearing. These arguments presented by the petitioners are not convincing, and the conclusions of law and facts set forth in the order dated August 31, 1966, remain unchanged.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. 855), and other applicable statutes, and pursuant to 25 CFR 15, for the foregoing reason, the above-mentioned petition for rehearing is hereby denied.

This action on the petition for rehearing becomes final sixty (60) days from the date hereof. The petitioners may within this 60 day period (or within such additional period as the Secretary, for good cause may allow) file with the Superintendent, Anadarko Agency, Bureau of Indian Affairs, Anadarko, Oklahoma, a written notice of appeal to the Secretary of the Interior. Such notice of appeal shall state specifically and concisely the reasons for the appeal. Copies of the notice of appeal shall be furnished by the appellants to the Examiner of Inheritance and to all parties who share in the estate under the decision of the Examiner, and the notice of appeal shall contain a certification stating that this has been done. In addition, the appellants and any other interested party may, within 60 days from the date on which the notice of appeal is filed, submit written arguments to the Tulsa Regional Solicitor, U. S.

Department of the Interior, 712 Petroleum Building, Tulsa, Oklahoma.

Done at the City of Tulsa, Oklahoma, and dated November 16, 1966.

(Sgd.) Kent R. Blaine
Kent R. Blaine
Examiner of Inheritance

Appendix xiii

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
TULSA REGION
P. O. Box 3156
Tulsa, Oklahoma 74101

IA-T-4

June 20, 1967

Estate of George Chahsenah, deceased Comanche unallottee	:	Probate H-173-66 and H-220-66 Order approving will reversed

APPEAL FROM A DECISION OF A HEARING EXAMINER

Dorita High Horse and certain nieces and nephews of the decedent, George Chahsenah, appeal through counsel from an order of the Hearing Examiner, Tulsa, dated August 31, 1966, approving a will of the decedent, and from an order dated November 16, 1966, denying their petition for a rehearing.

The decedent died on October 11, 1963, at the age of 55 years, a resident of the State of Oklahoma, having never married and leaving no surviving parent, brother, or sister. He was survived by several nieces and nephews, most of whom are appellants herein, and by his daughter, Dorita High Horse, appellant herein, the paternity of whom the decedent had acknowledged on several occasions. The evidence supporting the Examiner's finding of fact that Dorita High Horse is decedent's daughter is virtually uncontradicted in the record

and is so convincing that this finding would be sustained on appeal if it had been contested, which it was not.

The record discloses that the decedent executed at least six wills dated successively November 27, 1956, in favor of a niece, Viola Atewooftakewa; March 19, 1957, in favor of a friend, Sammy Schwartzer; May 21, 1959, in favor of a friend, Fred H. Benge; October 20, 1959, in favor of a nephew Strudwick Tahsequah; March 6, 1962, in favor of a cousin, Rosa May Wahahrockah; and March 14, 1963, in favor of a niece, Viola Atewooftakewa, and her three children, Frankie Lee Tooahnippah, Vila Tooahnippah and Julia Tooahnippah. None of these wills contains a reference to the daughter of the decedent, although the earliest purported will states that decedent had no children.

The record supports the Examiner's conclusion that, although the decedent's excessive drinking may have grown progressively worse during the last few years of his life, testimony to the effect that the decedent was "never sober" for a period of several years must be rejected as impossible to accept at face value. The record further supports the Examiner's conclusion that the decedent was not in an intoxicated condition at the time he executed the latest purported will dated March 14, 1963. It also supports strongly his further conclusion that when the decedent "'needed' or really wanted something to drink, he would promise, threaten, beg, or do whatever was necessary in an attempt to get alcohol."

The record contains no indication that the decedent ever made any personal effort to work or

earn any wages during his lifetime, but reflects that his principal income was the money he received, usually at monthly intervals, from the leasing of his restricted lands for oil, gas and agricultural purposes. These funds were usually spent within a few hours or days after he received them for intoxicants and for personal items, such as foodstuffs, which could, and often would, be subsequently traded for intoxicants during periods of temporary financial adversity. In order to purchase intoxicants during such periods, he often obtained advances of money from relatives or other associates, several of whom were named as devisees in his various purported wills, and repaid such loans when funds were subsequently received.

The Examiner concluded that the will dated March 14, 1963, met the technical requirements for a valid will and was not unnatural in failing to provide for the decedent's daughter as there was no evidence that the decedent had any close paternal ties to the daughter during the later part of his life. He thereupon approved the latest purported will of the decedent by an order dated August 31, 1966, apparently without considering whether the circumstances were such as to justify such approval as an exercise of the discretionary authority conferred upon the Secretary by 25 U.S.C. §373. The Secretary's responsibility is not adequately discharged when he, or an examiner acting for him, determines that a purported will meets the technical requirements for a valid dispository instrument and thereupon, without further consideration, approves the will as a matter of course. When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before

approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law. 1/

Since the record contains sufficient evidence of the relationship between the decedent and his heir-at-law and his devisees to ascertain whether approval of the will by the Hearing Examiner was an appropriate discharge of the Secretary's responsibility, consideration of the circumstances surrounding these persons will be given at this appellate level.

The decedent was the natural father of Dorita High Horse. The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets. Before the daughter's birth, he abandoned the mother, with whom he had been living. Although marriage to the mother was not impeded by any existing or subsequent marriage to another woman, the decedent neglected to remain and maintain a home with the mother in order that the daughter would have the advantages of a normal home life during her childhood. Notwithstanding

---

1/ Estate of Oliver Maynahonah, IA-T-1 (June 30, 1966), affirmed as Kadayso v. Udall, Civil Action 66-281, U.S. District Court, Western District of Oklahoma (February 14, 1967); Estate of Kosope (Richard) Maynahonah, IA-141 (October 28, 1954); and Estate of Frank (Oren F.) Simpkins, Osage Allottee No. 1879 (will disapproved December 1, 1943, application for reconsideration denied February 23, 1945).

the fact that the decedent received income from his restricted lands, he made no contribution toward the support or education of his daughter, leaving her to be supported by her mother, until she died when the daughter was six years old, and thereafter by a maternal aunt. The decedent's legal responsibility for the support of his daughter during her childhood could have been enforced by judicial action on her behalf to the extent, if any, that he had unrestricted income or assets, and the Secretary or his authorized representative probably would have honored reasonable requests on the daughter's behalf for contributions toward her support from the decedent's income from restricted lands. However, no action toward that end was taken by the decedent, by his daughter, or by others on her behalf.

If the decedent had died several years earlier leaving an orphaned minor daughter being raised by an aunt, any will disinheriting the daughter would be subject to disapproval because the estate would be needed for discharging his responsibility for supporting the child. The fact that the daughter had attained majority and married prior to the death of the decedent does not alter the fact that the decedent had an obligation to his daughter which was not discharged either during his lifetime or under the terms of his purported will. For this reason it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's wefare by lending his approval to the decedent's will.

This decedent failed to make any appreciable effort toward discharging his responsibilities to his daughter during her childhood, and upon her attaining adulthood he attempted by will to devise

and bequeath to others such of his restricted assets as had not been dissipated. This he could do only if he possessed unrestricted power of testamentary disposition. His attempt to do so, however, was limited by the fact that the Secretary must exercise the discretionary responsibility of approving the will before it can become effective. Although the Examiner approved the will, this appeal from that approval requires the appellate authority to determine whether such approval was a reasonable exercise of the discretionary responsibility of the Secretary.

I hereby determine, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2a(3)(a), 24 F.R. 1348) and redelegated to the Regional Solicitor (Solicitor's Regulation 23, 31 F.R. 4631), that under the circumstances hereinbefore set forth the Secretary's approval of the purported will dated March 14, 1963, should not be given, the Examiner's approval is rescinded, and the will is hereby disapproved.

Each of the decedent's previous wills would receive similar disposition if offered for approval because each of them disinherits the decedent's daughter. It follows that no useful purpose would be served by additional hearings, for which reason the Examiner's denial of a petition for rehearing is not reversed. Accordingly, the entire estate of the decedent remaining after payment of allowed claims shall be distributed, without further order of the Examiner, to Dorita High Horse as the sole heir of the decedent.

(Sgd.) Raymond F. Sanford
Raymond F. Sanford
Regional Solicitor

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOFTAKEWA (Tate) FRANKIE LEE TOOAHNIPPAH VILA TOOAHNIPPAH, and JULIA TOOAHNIPPAH (Goombi)	Plaintiffs	CIVIL NO. 67-323
-vs-		
STEWART L. UDALL, Secretary of the Interior for the UNITED STATES OF AMERICA	Defendant	
DORITA HIGH HORSE	Intervenor	

Omer Luellen, Hinton, Oklahoma, for Plaintiff

Robert L. Berry, Assistant United States Attorney, Oklahoma City, Oklahoma, for Defendant

Houston Bus Hill, Oklahoma City, Oklahoma, for Intervenor

MEMORANDUM OPINION

Before LUTHER B. EUBANKS, United States District Judge

The plaintiff's are Comanche Indians who were named as beneficiaries under their deceased Comanche uncle's last will and testament which the Secretary of the Interior has declined to approve, and seek by this action to set aside the administrative decision which denied approval of the will, alleging it to be arbitrary, capricious, in excess of authority, without reasonable basis, and that it amounts to an abuse of discretion. 1/ The sole

---

1. Plaintiffs have attempted to invoke jurisdiction under the Administrative Procedure Act, 5 U.S.C. §701 et seq. The decisions do not appear to be entirely in harmony as to the scope of the jurisdiction conferred by the Administrative Procedure Act to grant review of administrative decisions in actions brought against the Secretary of the Interior for that purpose. There can be no doubt but that this court has jurisdiction under 28 U.S.C. §1361, and upon that basis jurisdiction is taken here, as it has been by this court upon other occasions, in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates. Moreover, this court has heretofore considered and resolved to its satisfaction that there is no express limitation contained in the language of §2 of the Indian Probate Act, infra, which precludes judicial review of Indian will approval decisions. Unlike §1 of the act, which relates to the determination of the heirs of Indians who die without having made a will, §2 contains no language by which will approval decisions of the Secretary are made final and conclusive. See Homovich v. Chapman, 191 F.2d 761 (D. C. Cir. 1951); Attocknie v. Udall, 261 F. Supp. 876 (W.D. Okla. 1966).

basis for denying approval is that the will failed to make provision for the intervenor, who was determined by the Secretary to be the decedent's daughter born out of wedlock, and as such to be entitled to inherit the entire estate as decedent's sole heir, in the absence of an approved will, by virtue of the provisions of 25 U.S.C. §371.

Congress has granted to Indians the right to make wills, subject only to the approval of the Secretary of the Interior. 2/ Such approval is

---

2. The authority of the Secretary of the Interior to approve wills of Indians owning allotted lands is contained in § 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373, which provides, in its essential details, that any Indians, except members of the Five Civilized Tribes or of the Osage Tribe, over the age of twenty-one years having any right, title or interest in any Indian lands or moneys held in trust by the United States or restricted upon alienation shall have the right to dispose of such property by will in accordance with regulations to be prescribed by the Secretary of the Interior. It further provides that such a will shall not be valid nor have any force or effect unless it shall have been approved by the Secretary of the Interior; that the Secretary may approve or disapprove the will either before or after the death of the testator and where such a will has been approved and it is subsequently discovered that there was fraud in connection with the execution or procurement thereof, the Secretary of the Interior within one year after the death of the testator may cancel the approval of the will, and the property of the testator shall thereupon descent or be distributed in accordance with the laws of the state wherein the property is located.

requisite to validity. Lacking such approval an Indian will is totally without force and effect to dispose of the trust estate. The will which is the subject of this review has never received the required Secretarial approval and, therefore, is not a valid will; nor can it achieve the status of a valid will until such time as the approval required by the statute has been conferred. The question with which this court is concerned in the present action is whether the Secretary, in the circumstances presented, can properly withhold his approval of this will, which otherwise meets all of the requirements of a valid testamentary instrument, without such action amounting to an arbitrary denial of the decedent's statutory right to predetermine those persons to whom his trust estate shall devolve.

The will which is the subject of the administrative decision under review in this action was made by George Chahsenah, an unallotted Comanche Indian, approximately seven months prior to his death. He died without having ever been married, and without leaving a surviving father, mother, brother or sister. He was the owner by inheritance of certain Indian property allotted in accordance with the provivions of the General Allotment Act of February 8, 1887 3/ which, under the provisions of his will, was devised to a niece and her children with whom, the record indicates, he resided for a considerable portion of the later years of his life. The hearing examiner found no lack of testamentary capacity, and that the will was not the product of

---

3. 24 Stat. 388. The act provides, inter alia, that the United States shall hold the lands in trust for the allottee during the existence of the trust period or any extension thereof, or, in case of his decease, for his heirs.

fraud, duress, coercion, or undue influence. 4/ In accordance with the applicable regulations 5/ the examiner entered an order which approved the will and decreed distribution of the estate in accordance with its provisions. A petition for rehearing was subsequently filed and denied by the examiner.

The hearing examiner found the decedent to have been survived by an adult daughter, Dorita

---

4. The administrative record discloses that the examiner held four separate formal hearings upon the decedent's will prior to the entry of his order of approval. The purpose of those hearings was to ascertain whether or not the will was entitled to receive the approval required by § 2 of the Indian Probate Act, supra. The examiner's authority to grant such approval is derived from a delegation of the Secretary's authority set out in the appropriate departmental regulations. The examiner found the will to be entitled to approval and he approved it.

5. The applicable regulations of the Secretary of the Interior are set out in Part 15 of 25 C.F.R. (1966 ed.).

High Horse, born out of wedlock, 6/ and that her mother and the decedent had cohabitated together in the custom and manner of Indian life sufficiently to entitle the daughter to inherit from the decedent under 25 U.S.C. §371. The effect of those findings is to make Dorita High Horse the decedent's sole heir at law, and thus entitled to inherit the decedent's entire estate in the absence of an approved will.

---

6. This court has not found the evidence of the decedent's paternity nearly as convincing as did the hearing examiner and the Regional Solicitor. The evidence in that regard which is contained in the administrative record is conflicting and, in my view, could have supported a finding to the contrary. I am intrigued by the singular fact that the mother of this putative daughter, Mary High, must have suffered from an equal lack of conviction of the decedent's paternity, as evidenced by her actions at the time of Dorita High Horse's birth. She attributed paternity to a different individual, and that individual is named as the father in the birth certificate which was prepared at the time. The only telling evidence in support of the finding is a skillfully typewritten letter, dated August 31, 1949, and obviously not prepared by the decedent, which is addressed to the Oklahoma Bureau of Vital Statistics and which is purported to be signed by the decedent, wherein it is stated that Dorita High is his daughter and that he was "perfectly willing for her to use /his/ name as her name on her birth certificate or in school." The record would seem to indicate that, until she acquired the surname "Horse" as a result of her present marriage, she went by the surname of her mother.

The evidence in the administrative record indicates that the decedent and Dorita High Horse never maintained the usual father-daughter relationship. Their relationship can best be described as being that of casual acquaintances. The Regional Solicitor, in his administrative decision which rescinded the examiner's approval of the decedent's will, noted that fact. He stated: ". . . The record reflects that during his lifetime the decedent's only contribution toward the welfare of his daughter was to participate in her conception, to acknowledge her status as his daughter, and to visit briefly with her on rare occasions when they would by accident meet on public streets . . ."

Having been denied their petition for rehearing, the plaintiffs appealed to the Secretary of the Interior. Pursuant to authority delegated to the Solicitor of the Department of the Interior and redelegated to the Regional Solicitor, the latter reviewed the record and thereupon issued his decision which reversed the hearing examiner's order and withdrew the approval of the will which had been granted by the examiner. The Regional Solicitor's action constituted a final administrative decision which exhausted the administrative remedy and led to the filing of this action for review.

The Regional Solicitor, in support of his conclusion that approval was to be denied, stated in his decision that "/W/hen a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and

equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law."

The import of the Regional Solicitor's views is that an inequity will result should the decedent's estate be permitted to devolve upon a niece, who had provided the decedent with a home, and to her children, and thereby is denied to a putative daughter whose relationship with the decedent was only of the most casual nature. I find difficulty in following his reasoning to that conclusion. Moreover, there is danger in that course in that it provides no recognizable standard, thereby permitting the Secretary to go as near or as far in the grant of his sanction as his sympathies may lead him, in whatever direction, and conceivably could result in all manner of discretionary abuses.

Wills are a common feature of modern life. They are customarily made with only one purpose in view, that purpose being to alter the usual order of descent and distribution. Otherwise the act of making a will would be meaningless. The concept of the will making process is that the maker is provided with a method by which he can predetermine the persons to whom his estate shall devolve. It is not infrequent that those heirs who are not included in the will maker's bounty should appear to be victims of inequitable treatment. Equity plays no part in the will making process, as any heir who has been cut off without a dollar will vouchsafe. A will is the testator's last available means of rewarding those who have befriended him during his lifetime and for evening the score with those who have not. It must be assumed that the will maker has his reasons, and that they are valid.

Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right.

Where disapproval is founded upon some rational basis, denial of approval of an Indian will cannot be said to be an abuse of discretion. 7/ Examples of what may constitute reasonable bases upon which approval may be denied are lack of testamentary capacity, fraud, duress, coercion, undue influence, overreaching, substantially changed conditions as to the decedent's heirs or estate occuring subsequent to the making of the will, and improvident disposition.

---

7. It is a well-established proposition that administrative action must have a "reasonable" or "rational" basis if it is to avoid the stigma of arbitrariness. Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 67 S. Ct. 1575, 91 L.Ed. 1995 (1947); Unemployment Compensation Commission of Territory of Alaska v. Aragan, 329 U. S. 143, 67 S. Ct. 245, 91 L. Ed. 136 (1946); Dell Publishing Co. v. Summerfield, 198 F. Supp. 843 (D.D.C. 1961), aff'd, 303 F. 2d 766 (D.C. Cir. 1962); Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 54 S. Ct. 692, 78 L. Ed. 1260 (1934); Eastern Central Motor Carriers Ass'n. v. United States, 239 F. Supp. 243 (D.D.C. 1965)

In the decision now under review, the will was denied approval because the decedent had failed to make provision for a daughter born out of wedlock. In Attocknie v. Udall, 261 F. Supp. 876 (W.D. Okla. 1966), this court upheld a decision of the Secretary which granted approval to an Indian will in exactly opposite circumstances from those presented here. In that case approval was granted to a will wherein no provision was made for a son born out of wedlock. I am unable to perceive the distinction wherein that will was considered to be susceptible of approval but the will which is the subject of this review was not considered to be susceptible of being accorded the same treatment.

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

The motion of the plaintiff is granted, the motions of the defendant and the intervenor are denied, and the will is remanded to the Secretary of the Interior with directions to approve it and distribute the decedent's estate in accordance with its provisions.

Counsel for plaintiff will prepare formal judgment in accordance herewith.

The Clerk will mail a copy hereof to all counsel of record.

Dated this 18th day of December, 1967.

(Sgd.) Luther B. Eubanks
Luther B. Eubanks
United States District Judge

Appendix xxx

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

VIOLA ATEWOOFTAKEWA (Tate) FRANKIE LEE TOOAHNIPPAH VILA TOOAHNIPPAH, and JULIA TOOAHNIPPAH (Goombi)	Plaintiffs	)
vs.		) CIVIL NO. 67-323
STEWART L. UDALL, Secretary of the Interior for the UNITED STATES OF AMERICA	Defendant	)
DORITA HIGH HORSE	Intervener	)

ORDER AND JUDGMENT

This cause came on to be heard on the Motion of the Defendant, Stewart L. Udall, Secretary of the Interior for the United States of America for Summary Judgment and on the Motion of the Intervener, Dorita High Horse for Summary Judgment, and on the Cross-Motion of the Plaintiffs, Viola Atewooftakewa (Tate), Frankie Lee Tooahnippah, Vila Tooahnippah, and Julia Tooahnippah (Goombi) for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the administrative record of the testimony, pleadings, and files on file herein relative to the probate of the Will of George Chahsenah, deceased Comanche Unallottee, and all of the parties herein having furnished their written Briefs to the Court upon the issues herein, and the Court having determined that this Court has jurisdiction of the said Action, and the Court

having found that the denial of the approval of the last Will and Testament of George Chahsenah, deceased, dated March 14, 1963, by the Secretary of the Interior lacks a rational basis and is an unreasonable and arbitrary denial of the right of George Chahsenah to make his last Will and Testament as conferred upon him by Congress, and due deliberation having been had thereon, and the decision of this Court having been filed herein, it is

ORDERED that the Defendant's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Intervener's Motion for Summary Judgment be and the same hereby is denied, and it is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment be and the same is hereby granted, and it is further

ORDERED, ADJUDGED AND DECREED that the last Will and Testament dated March 14, 1963, of George Chahsenah, deceased Comanche Unallottee, is remanded to the Secretary of the Interior for the United States, and it is further

ORDERED, ADJUDGED AND DECREED that the Secretary of the Interior approve the last Will and Testament of George Chahsenah, deceased, and distribute his Estate in accordance with the provisions of the decedents last Will and Testament.

Dated this 28 day of December, 1967.

(Sgd.) Luther B. Eubanks
Luther B. Eubanks
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1969, TERM

DORITA HIGH HORSE,
Appellant,

vs.

JAMES TOOAHIMPAH TATE,
FRANKIE LEE TOOAHNIPPAH,
VILA TOOAHNIPPAH and
JULIA TOOAHNIPPAH (GOOMBI),
Appellees.

Number 9979

STEWART L. UDALL, SECRETARY OF THE INTERIOR, DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES TOOAHIMPAH TATE,
FRANKIE LEE TOOAHNIPPAH,
VILA TOOAHNIPPAH and
JULIA TOOAHNIPPAH (GOOMBI),
Appellees.

Number 9980

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Houston Bus hill, Oklahoma City, Oklahoma, for Appellant, Dorita High Horse;

Clyde O. Martz, Assistant Attorney General, Washington, D. C. (B. Andrew Potter, United States Attorney, Oklahoma City, Oklahoma, Robert L. Berry, Assistant United States Attorney, Oklahoma City, Oklahoma, S. Billingsley Hill and John G. Gill, Jr., Attorneys, Department of Justice, Washington, D C. on the brief) for Appellant, Stewart L. Udall, Secretary of the Interior.

Omer Luellen, Hinton, Oklahoma, for Appellees.

Before MURRAH, Chief Judge, and PHILLIPS and HILL, United States Circuit Judge.

PER CURIAM.

This litigation originated with the filing of a complaint in the United States District Court for the Western District of Oklahoma by the appellees in the two consolidated appeals before us. The action sought judicial review of the orders of the Secretary of the Interior and his subordinates. Jurisdiction was invoked under the Administrative Procedure Act and 28 U.S.C. § 1391. The trial court took jurisdiction under § 1391, sustained a Motion for Summary Judgment filed by the plaintiffs, appellees here, and reversed the order of the Secretary and his subordinates.

The basic facts are without dispute. One George Chahsenah, a Comanche Indian, died, leaving a will dated March 4, 1963, and by this instrument left all of his estate consisting of Indian Trust

property to his niece and her three children, who are the appellees in both appeals. 1/ Pursuant to 25 U.S.C. § § 372 and 373, after hearings, a Department of Interior Examiner of Inheritance approved the will and ordered distribution of the estate accordingly. Appellant, Dorita High Horse, the natural daughter of the testator, contested the will before the Examiner and appealed the decision to the Secretary of the Interior.

The Secretary reviewed the record, approved the findings of fact made by the Examiner, including a finding that Dorita was the natural daughter and only heir-at-law of the decedent, and ruled that it was "inappropriate" to perpetuate this utter disregard for the daughter's welfare by lending his approval to decedent's will." He disapproved the will and ordered distribution to Dorita High Horse, as the sole heir of decedent. The filing of this action followed and Dorita intervened to assert her rights under the decision of the Secretary.

At the outset we are confronted with the question of jurisdiction, which was raised in the trial court and argued here by appellees. A lengthy discussion of the question is not necessary because

---

1/ The record shows that the decedent had executed five prior wills. The first in 1956 left his propert to a niece; the second in 1957 left his property to a friend; the third in 1959 left his property to a different friend; the fourth in favor of a nephew; and the fifth devised his estate to a cousin. None of his wills contained any reference to appellee Dorita High Horse, his daughter.

this court, in two recent decisions, has denied jurisdiction of the courts to review orders of the Secretary concerning either intestate succession of restricted Indian property or the approving or disapproving of wills affecting restricted Indian property. In a well reasoned opinion in Heffelman v. Udall, 378 F.2d 109 (1967), Judge Lewis held that sections 1 and 2 of 25 U.S.C. § 372 precluded judicial review of such orders in any action brought under 28 U.S. C. § 1331, § 1361, § 1391 or § 2201. In Attocknie v. Udall, 390 F. 2d 636 (1968), cert. den. October 14, 1968, this court reaffirmed the teachings of Heffelman, and we certainly are not disposed to disturb the law of those cases.

For the reasons stated in Heffelman v. Udall, supra, and Attocknie v. Udall, supra, the judgment of the trial court is Vacated and the case is Remanded with directions to dismiss the action for want of jurisdiction.

filed
United States Court of Appeals
Tenth Circuit

MAR 3 1969

William L. Whittaker
Clerk

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable Delmas C. Hill, Circuit Judges.

Dorita High Horse, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	9979-9980
	)	
James Tooahimpah Tate et al.,	)	
	)	
Appellees.	)	

These causes came on to be heard on the motion of appellees for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered that the said petition be and the same is hereby denied.

Before William L. Whittaker, Clerk.

April 8, 1969

The Code of Federal Regulations that are still in full force and effect and were in full force and effect when the Will of George Chahsenah, the decedent herein, was executed and when same was offered for probate and approval can be found in Title 25 of the Code of Federal Regulations, Subchapter C-Probate Part 15 and all Sections of Part 15 that pertain to the execution of Wills and the approval of said Wills of Indian testators are as follows:

"§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent will or other writing executed with the same formalities as are required in the case of the execution of a will, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be revoked by operation of the law of any State.

§ 15.1 'Administration of estates.' The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part.

§ 15.12 'Wills, validity attested.' No action shall be taken on the will of a deceased Indian until testimony shall have been taken as to the testamentary capacity of the decedent to execute the will and as to the circumstances surrounding its execution. A reasonable effort shall be made to procure the testimony of the attesting witnesses to the will; or, if their testimony is not reasonably available, an effort shall be made to identify their signatures through other evidence.

§ 15,15 'Decision.' The Examiner of Inheritance shall, except as provided in § 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and

legatees who take under the will and the particular property which each is to receive, and shall construe any ambiguous provision of the will. Every decision shall state those claims against the estate which are allowed and those claims which are disallowed. A copy of the decision shall be mailed to each person who is found by the Examiner to be entitled to share in the estate, to each person whose claim to share in the estate was considered and denied by the Examiner, and to the Superintendent."